UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BOGOPA, INC., D/B/A FOOD BAZAAR

Employer[1]

and Case No. 29-RC-9435

LOCAL 890, LEAGUE OF INTERNATIONAL FEDERATED EMPLOYEES

Petitioner

and

RETAIL, WHOLESALE AND CHAIN STORE FOOD EMPLOYEES UNION, Affiliated with RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

Intervenor[2]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Joanna Piepgrass, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

[1] The name of the Employer appears as amended at the hearing.

[2] The Intervenor intervened on the basis of its current collective bargaining agreement with the Employer.

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated, and the record shows, that the Employer is a New York corporation engaged in the operation of a chain of supermarkets, one of which is located on 1759 Ridgewood Place, Brooklyn, New York, herein called the Ridgewood Place location.[3] During the past year, the Employer derived revenues in excess of $500,000 from the retail sale of groceries, and purchased, and received at its Ridgewood Place location, goods and materials valued in excess of $5,000 directly from entities located outside the State of New York.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. The Petitioner seeks an election in a unit of all full-time and regular part-time employees employed by the Employer at its Ridgewood Place location excluding butchers, meat wrappers and store managers. The Intervenor contends that its contract with the Employer bars an election in such a unit. The Petitioner appears to assert the contract forfeits its bar quality because it conditions the payment of the wages and benefits contained therein upon membership in the Intervenor. In addition, it appears to maintain that because its

[3] This supermarket also encompasses a building located at 454 Wyckoff Avenue, and the employees who testified identified the 454 Wykoff Avenue facility as the address of their employer.

terms have not, in large part, been enforced, it fails to provide the requisite stability in labor relations to act as a bar. The Petitioner further argues that the contract forfeits its bar quality because its checkoff clause conditions employment upon the payment of assessments. The Intervenor maintains that its agreement with the Employer is not a "members-only" contract. Although it acknowledges that the contract's terms have not been applied to some of the Employer's employees, it argues that it is now taking measures to enforce the contract, and that it remains willing and able to represent the employees in the petitioned-for unit. It further contends that its checkoff clause is lawful. Although the Employer concedes that its contract with the Intervenor appears to cover the petitioned-for unit of employees, it did not take a position on whether it was a bar.

The record shows that the Employer operates at least six supermarkets in the boroughs of Brooklyn and Queens, New York. The Employer and Intervenor are parties to a collective bargaining agreement effective from October 4, 1998, to October 5, 2002. Article 1 (Definition and Coverage), Section (a) states:

> This agreement covers, and the term "employee" or "employees" as herein used includes all of the Employer's present and future full-time and part-time employees (other than store managers, butchers and meat wrappers) employed in all departments in all of the present and future supermarkets and stores operated by the Employer in the City of New York and the State of New York.

Handwritten on the signature page are the names and addresses of five stores including the store covered by the instant petition. These entries appear to have been initialed by the signatories to the contract. A sixth supermarket is named in the agreement's introductory paragraph.

The Checkoff Clause

Article 2 (Union Recognition and Union Shop), Section (b) provides as follows:

> All present full time and part time employees who are members in good standing in the Union, shall, as a condition of continued employment, maintain membership in good standing in the Union during the life of this Agreement through regular payments to the Union of the periodic dues and the initiation fees uniformly required as a condition of acquiring and retaining membership. All new full-time and part-time employees, and all present full time and part time employees who are not members in good standing in the Union, shall, as a condition of continued employment, join the Union thirty days after the date of their employment or the effective date of this Agreement or the date of the execution of this Agreement, whichever is later, except that part time employees shall not be required to join the Union until they have completed their trial period and shall thereafter maintain membership in good standing in the Union during the life of this Agreement through regular payments to the Union of the periodic dues and initiation fees uniformly required as a condition of acquiring and retaining membership…Membership in the Union shall not be construed in violation of the provisions of applicable law.

The checkoff clause (Article 12) provides:

> Under the written authorization of the employees in accordance with applicable law, the Employer shall, on the first weekly pay day in each calendar month, deduct from the wages of each such employee a sum equal to such employee's Union dues, fees and assessments, which the Employer shall pay over to the Union or its duly authorized representative, receiving the Union receipt therefor. Such deductions must be paid over to the Union on or before the 20th day of each and every month, covering the amounts so deducted for that month.

In Paragon Products, Inc., 134 NLRB 662 (1961), the Board set forth its standards for determining what impact an unlawful union security provision would have upon the bar status of the contract in which it was contained. Therein, the Board stated that a contract would only forfeit its bar quality if its union security

provision was clearly unlawful on its face or had been found unlawful in an unfair labor practice proceeding. Among the union security provisions that are clearly unlawful on their face are those which expressly require as a condition of employment the payment of monies other than periodic dues and initiation fees uniformly required as a condition or retaining membership. Santa Fe Trail Transportation Co., 139 NLRB 1515 (1962).

The Petitioner appears to contend that the checkoff provision, when read in conjunction with the union security clause, requires as a condition of employment the payment of assessments, monies other than periodic dues and initiation fees. In Suffolk Banana Co., Inc., 328 NLRB No. 157 (1999), the Board rejected a similar argument. Therein, the contract contained a union security provision which required as a condition of employment membership in good standing. The checkoff clause authorized the deduction of dues, initiation fees and assessments upon the execution of a checkoff form. The Board, noting that neither the checkoff provision nor the union security clause expressly required the payment of assessments as a condition of employment, determined that the provisions were not unlawful on their face and upheld the contract as a bar.

In the instant matter neither the union security clause nor the checkoff provision state that the payment of assessments is required as a condition of employment. Rather, the union security clause repeatedly states that membership in good standing is required as a condition of employment, and it appears to limit its definition of membership in good standing to the payment of dues and initiation fees. Although the checkoff clause authorizes the deduction

of assessments, it does not state that the payment of assessments is required as a condition of obtaining and retaining membership in the Intervenor. Accordingly, I find that the checkoff provision is not unlawful on its face and does not result in the forfeiture of the contract's bar status.

The Contention That The Contract Has Not Applied To Unit Employees or has Been Enforced on a "Members-Only" Basis

The collective bargaining agreement contains numerous provisions relating to the compensation of unit employees. These provisions include, but are not limited to: wage rates (Appendix A), wage increases (Appendix A), overtime and premium pay (Article 7), vacations (Article 9), paid holidays (Article 8), sick leave (Article 17), uniforms (Article 23), health benefits (Article 16), retirement benefits (Article 16), and dental benefits (Article 16). The record establishes that these provisions have been applied to few if any of the 69 employees in the unit.

Ginelda Peralta, a cashier employed by the Employer for over two years, testified that she is paid an hourly wage of $5.15 per hour, considerably less than the $345.00 per week contractual wage rate for clerks who have completed their probationary period by October 4, 1998. **(**Appendix A, paragraph (e)**).** Although that same provision appears to provide that she was due at least two wage increases between the start of her employment and the time of the hearing, she has not received any raises since she began working for the Employer.[4] She did not receive any paid vacations during that period as required by Article 9 of the

[4] Assuming that a cashier is not considered a clerk, it would still appear that she was being paid considerably less than the contractual wage rate.

contract. Nor did she receive overtime pay when she worked on Sundays or when she worked over 8 hours per day as required under Article 7. Although Article 7 also provides for premium pay when working holidays, she received her regular rate of pay when she worked the holidays set forth in Article 8. Although Article 23 states that the Employer will provide uniforms free of charge, Peralta was required to pay the Employer $20.00 for the smock she wears.

From November 6, 1999, until sometime in January 2000, she took a leave of absence because she was pregnant. She was not provided with any medical coverage during that period. (Article 16). Nor was she paid the sick leave provided for in Article 17. When she returned to work, she was required to fill out an employment application.

Like Peralta, Thomarie Solis, another cashier who began working for the Employer in early 1999, testified that she was hired at an hourly rate of $5.15, considerably less than the $5.50 per hour (Appendix A, paragraph (k)) that the contract would appear to require her to have received. She did not receive the 25 cent per hour wage increase that would appear to have been required by the contract. Nor did she receive premium pay for working holidays, or overtime pay when she worked more than 8 hours per day. As was the case with Peralta, she did not receive paid vacations or medical benefits.

The parties stipulated that if called as witnesses, five other employees would testify that they had not received the benefits set forth in the contract including but not limited to wage increases, overtime pay, vacations, sick leave, or medical benefits.

Neither the Employer nor the Intervenor introduced any testimony or documentary evidence that would definitively establish that the contract's terms were being enforced with respect to any of the Employer's 69 employees. The Intervenor submitted as an exhibit a computer printout that showed that to the best of its knowledge, the Employer employed 12 employees who are members of the Intervenor at the Ridgewood Place location. However, the Employer also submitted a computerized payroll report showing the names of the employees working at its Ridgewood Place supermarket as of February 27, 2000. Only two of the names on the Intervenor's exhibit appear on the Employer's payroll report. The Intervenor's exhibit indicates that most of the individuals appearing thereon paid their initiation fees in 1998 or early 1999, and the Intervenor's Business Agent, Murray Morrissey, conceded that it was possible that most of these employees are no longer working at the Ridgewood Place supermarket. Neither the payroll listing submitted by the Employer, nor the exhibit submitted by the Intervenor shows the wage rates being earned by the employees at the Ridgewood Place supermarket. Nor do they indicate whether they are enjoying any of the other benefits set forth in the contract. Morrissey stated that when an employer is delinquent in making contributions to the funds partially administered by the Intervenor, he is notified. However, he has never examined the fund's records to see whether the Employer has made contributions on behalf of employees employed at the Ridgewood Place location, and neither the Employer nor the Intervenor submitted any records that would show that such contributions have been made.

The Intervenor argues that it is taking measures to enforce its contract, and that it remains willing and able to represent the petitioned-for employees. Morrissey testified that from October, 1998 until about August, 1999, John Driscoll, the Intervenor's current president, was the business agent responsible for servicing the Ridgewood place supermarket. During that period, the Intervenor's then president was ill, and Driscoll spent nearly all his time at the Intervenor's offices, rarely if ever visiting the facility. Morrissey stated that since being assigned the petitioned-for location in August, 1999, he has visited the facility on three or four occasions, and fielded about half a dozen phone calls from members employed there. On one of his visits he investigated a complaint that one of the Intervenor's members had not received a contractual wage increase. After reviewing the Employer's records, he determined that this employee had in fact received the wage increase required by the contract. Morrissey stated that even as of the date of the hearing, he had never checked the Intervenor's records to determine whether the Employer was making the required fund contributions on behalf of the employees employed at the Ridgewood Place supermarket. Nor does it appear that he took note of the relatively large number of employees working at the facility during his visits or that he made an effort to speak to any of them.

Morrissey asserted that even before he began servicing this location, a sign had been posted at the shop identifying the Intervenor as the bargaining representative of the supermarket's employees. He was not certain as to where it was posted, and the employee witnesses called by the Petitioner denied seeing

such a sign. It is undisputed, however, that in about early January, before the Petitioner had begun organizing, Morrissey himself posted a sign containing the Intervenor's name and address and also posted some window stickers naming the Intervenor as the employees' bargaining representative. Employees saw the sign Morrissey had posted and called the Intervenor. On February 3, Peralta, Solis and about six other employees met with Morrissey. He explained the benefits set forth in the contract. He also had the employees present sign dues checkoff cards and furnished them with a "generic" contract, which does not name the Employer, but by and large contains the same wages and benefits as are embodied in the Intervenor's contract with the Employer.[5] On February 7 he presented cards to the Employer and dropped off several blank membership applications which he asked the Employer to distribute. Morrissey asserted that he told the Employer that all the employees at the supermarket would have to join the Intervenor. The Employer representative he spoke to argued that the employees who had executed the checkoff cards were part time employees and thus were not entitled to some of the benefits received by full time staff. It appears that shortly thereafter, the seven or eight employees who had previously signed checkoff authorizations revisited the Intervenor's office and paid their

[5] It is not clear from Solis' testimony whether Morrissey told the employees they would be receiving backpay. The transcript reveals this exchange between Solis and Petitioner's counsel:

> Q: Did he say that you were entitled to sick days and holidays pay that you should have gotten?
> A: Yes.
> Q: Did he says he was going to get it back for you, for the last or, or would you be going forward, he was telling you, with what's in the contract?
> A: From the day we signed the contract.
> Q: Signed the pledge cards. From the day you joined the union, Local 338?
> A: Yes.

initiation fees. It appears that around this time a meeting was scheduled between the Employer, the Intervenor and the seven or eight employees who joined the Intervenor. The employees apparently brought pay stubs which they said showed that they were working on a full-time basis. Some of them also informed Morrissey that the Employer had slightly increased their pay but had also reduced their hours after they joined the Intervenor. The Employer did not bring any payroll records to this meeting, and the Intervenor and Employer agreed to reschedule the meeting without examining any of the records supplied by the employees. A subsequent meeting concerning this issue was also rescheduled. On March 1, the day before the hearing in the above matter, the Employer dropped off 23 membership applications at the Intervenor's office. Morrissey stated that he has informed the Employer that it will have to pay backpay for the reduction in hours.

In addition to arguing that Morrissey's actions over the last few months show a willingness to represent the petitioned-for employees, the Intervenor asserts that it has taken additional measures to assure that such lapses do not recur in the future. Since Driscoll became the Intervenor's president in about August, 1999, the Intervenor has hired three organizers, five service representatives and two additional business agents. However, Morrissey testified that the Ridgewood Place facility is one of 84 shops he is responsible for servicing. The Intervenor further points out that on a quarterly basis it holds union meetings open to all members employed within a given geographic area,

such as Brooklyn or Queens. It further asserts that it has arbitrated grievances involving employees of other employers.

The Petitioner maintains that the Intervenor's recent conduct does not manifest a willingness to represent all the bargaining unit employees employed at the Ridgewood Place store. Rather, it contends that its recent actions show an intention to limit the unit to the number of bargaining unit employees that join the Intervenor and to restrict the receipt of contractual benefits to these employees. Solis testified that on the day the Intervenor and Employer were scheduled to meet to discuss whether the seven or eight individuals who had recently joined the Intervenor were full-time or part-time employees, Morrissey spoke to these employees. He warned them not to solicit membership in the Intervenor among the remaining employees employed at the Ridgewood Place supermarket because the Employer would have to compensate those who became members more generously than it paid nonmembers and this could force the Employer to go out of business.[6] Morrissey denied making any such statement. The parties stipulated that if called to testify, five other employees would assert that Morrissey urged them not to solicit membership in the Intervenor because it would be too costly to the Employer. They further stipulated that if called as the Intervenor's witness, Nelson Restoff, who translated for Morrissey when he met with the employees, would testify that Morrissey did not make such a remark.

The Board's contract bar policies involve a balancing of the right of employees to select a representative and the Board's interest in promoting

[6] Tr. 111, 120, 122, 124-125.

stability in labor relations. Appalachian Shale Products, 121 NLRB 1160 (1958). The Board has held that mere negligence or inactivity on the part of a bargaining representative will not result in the loss of its presumed majority status or the bar quality of its collective bargaining agreement with an employer, particularly where that labor organization demonstrates a willingness to enforce its terms. Brower's Moving & Storage, Inc., 297 NLRB 207, fn. 12 (1989); The Kent Corporation, 272 NLRB 735 (1984); Pioneer Inn, 228 NLRB 1263, 1264 (1973); Road Materials, Inc., 193 NLRB 990 (1971). However, a contract which exists on paper only and bears no correlation at all to the terms and conditions of employees falling under its coverage does not provide the type of stability that justifies denying employees the right to choose their own bargaining representative. United Artists Communications, Inc., 280 NLRB 1056, 1063-1064 (1986); Silver Lake Nursing Home, 178 NLRB 478 (1969); Raymond's, Inc., 161 NLRB 838 (1966); Austin Powder Company, 201 NLRB 566, 567 (1973); R & E Asphalt Service, Inc., 185 NLRB 163 (1970); Industrial Paper Stock Company, 66 NLRB 1185 (1946). Similarly, a contract whose application is limited to union members unlawfully encourages support for the signatory union and does not impart the type of stability envisioned by Act. Ron Wiscombe Painting & Sandblasting Co., 194 NLRB 907 (1972); Grocers Wholesale, Inc., 163 NLRB 937 (1967); N. Summergrade and Sons, 121 NLRB 667 (1958).

In the instant case, apart from Morrissey's assertion that he verified that the Employer was paying an employee the contractual wage rate, there is no evidence that the contract's numerous economic terms have been applied to any

of the 69 employees employed at the Ridgewood Place supermarket. Rather, the only evidence presented shows a drastic departure from virtually all the economic terms contained in the agreement. Thus, I find that the contract has failed to impart the type of stability that would justify the abrogation of employees' Section 9 rights.

With regard to the Intervenor's argument, appearing in its brief, that a contract will only surrender its bar quality on nonenforcement grounds if there is an explicit understanding between the parties that its terms will not be followed, the Board has found that a simple abandonment of the unit, and a failure to apply or seek to apply any of the contract's terms to any of the employees covered thereby is sufficient to cause the forfeiture of the contract's bar status. United Artists supra, at 1063-1064; Raymond's, Inc., supra.

With regard to the Intervenor's assertion that it remains willing and able to represent the petitioned-for employees, even disregarding the disputed testimony that Morrissey urged employees not to solicit membership in the Intervenor because it would result in higher costs for the Employer, the record does not definitively establish that the Intervenor is willing to represent the employees covered by its contract with the Employer. For approximately a year from the date the contract went into effect in October, 1998, and possibly longer, it made no effort at all to ensure compliance with the contract's terms, even though the Ridgewood Place location employed about 69 employees and the Intervenor was receiving dues contributions on behalf of few if any of them. Morrissey's recent efforts have been limited to the posting of a sign, investigating a solitary wage

complaint, submitting the dues checkoff cards executed by some employees and entrusting the Employer with the distribution of membership cards. Although the Intervenor has been presented with compelling evidence that the Employer has failed to comply with the contract with respect to 7 or 8 employees it has yet to file a grievance on behalf of any of them. Notwithstanding the size of the workforce employed at the Ridgewood Place supermarket, and the extensive evidence of noncompliance with the agreement's terms that has been presented to the Intervenor, the Intervenor has neglected to further investigate the Employer's compliance with the contract by speaking to any of the remaining 62 employees or by requesting payroll records for this purpose.

Moreover, the cases in which the Board sets forth the "willing and able" standard are distinguishable from the instant matter. None involved a complete failure by the parties to enforce any of the contract's terms. Thus, apart from the fact that Brower's Moving and Storage, supra and Pioneer Inn, supra were both unfair labor practice cases, in Browers Moving and Storage, the employer had made fund contributions on behalf of a few employees, and both the union and the funds had taken a number of measures over the years, including the filing of a lawsuit, to secure compliance with the contract. In Pioneer Inn, the union therein had "resumed its role" as the representative of bargaining unit employees. Its actions included the vigorous pursuit of an employee's grievance, protesting the employer's unilateral change in the contractual medical care plan (there has been no such protest in the instant case) and visiting the facility to independently verify that the employer was posting the work schedule as

required by the contract. The Kent Corporation, supra, dealt primarily with the issue of whether the incumbent union was defunct rather than the employer's compliance with the contract. Except for the employer's failure to pay an employee the contractual wages, the record in that matter apparently did not show the parties' failure to enforce virtually all the economic terms of the contract to the entire unit. Similarly, in Road Materials, supra, the only evidence of noncompliance was the employer's action of unilaterally increasing employee wages. Thus, these cases do not stand for the proposition that when all the terms of a collective bargaining agreement are ignored with respect to the entire unit, the contract will maintain its bar quality so long as the incumbent union indicates a willingness to represent the petitioned-for employees.

Even assuming that an inference can be drawn from the evidence that fund contributions have been made on behalf of the two employees the Intervenor asserts are members, a finding that is not supported by the record, this would establish, at best, that portions of the contract are being applied on a members-only basis. In its brief, the Intervenor argues that the Employer has complied with certain provisions of the contract by assigning paid overtime to certain cashiers who are not its members. This assertion is not supported by the record. Rather, the record merely shows that some cashiers are assigned overtime work. In any event, assuming the Employer has complied with state or federal law as it applies to overtime pay, this would not demonstrate meaningful compliance with the Intervenor's collective bargaining agreement.

The Intervenor appears to further argue that Brower's Moving and Storage, supra, and cases cited therein, and Gardner Mechanical Services v. NLRB, 115 F.3d 636 (9th Cir. 1997), enforcing 313 NLRB 755 (1994), stand for the proposition that for a contract to forfeit its bar status as a members-only agreement the following conditions must be met: The language of the contract itself reflects an intent to have its application be limited to union members; the unit description contained in the contract is ambiguous; and the practice of the parties reflects an intention to limit the benefits contained in the contract to members. At the outset, it should be noted that none of these cases are contract bar cases. Rather, they all deal with the issue of a union's presumption of continuing majority status in the face of allegations that the contract is being applied on a members-only basis.[7] It might also be noted that in Arthur Sarnow Candy Co., Inc., 306 NLRB 213 (1992), another unfair labor practice case in which the Board dismissed a refusal to bargain complaint, the administrative law judge and the Board based their members-only findings upon the fact that the Employer had never hidden its employees from the union and the union had, without explanation, failed to request the contract's application to nonmembers. In any event, in N. Summergrade & Sons, supra, a contract bar case, the Board did not base its finding that the agreement therein lacked bar status upon the recognition clause or upon any other language contained in the agreement.

[7] Visitainer Corp., 237 NLRB 257 (1978) is also distinguishable from the instant matter. In that matter the Board determined that there had "been compliance with many of the contract terms and substantial compliance with others". The terms the parties had complied with included paid holidays and vacations, and the parties had successfully resolved "grievances concerning inadequacies in the physical environment at the plant…"

.

Rather, it based its finding upon the employer's practice under the agreement of restricting its application to union members and the union's failure to seek contributions on behalf of nonmember employees. Similarly, in Ron Wiscombe Painting, supra the Board again based its conclusion that the contract was a members-only agreement upon the practice of the parties.

Thus, even assuming that there is any compliance at all with the terms of the contract as it relates to the employees employed at the petitioned-for supermarket, since it is enforced on a members only basis, it does not bar an election in the instant matter.

In sum, inasmuch as the evidence demonstrates that the contract's terms have been disregarded by the parties with respect to virtually all the petitioned-for employees, or that they have been applied on a members-only basis, I find that the agreement between the Employer and the Intervenor does not bar an election in the instant matter. Accordingly, a question affecting commerce exists concerning the representation of certain employees.

5. As discussed above, the Petitioner seeks an election in a unit of all employees employed by the Employer at its Ridgewood Place location excluding butchers, meat wrappers and store managers. Both the Employer and the Intervenor declined to take a position concerning the appropriateness of the petitioned-for unit.

The Employer and the Intervenor have had a collective bargaining relationship since 1988 when the Employer opened its first store. The record did not show when the Employer began operating the Ridgewood Place supermarket

or when it was accreted to the unit. Because the Employer did not furnish any witnesses, the record revealed very little about the comparative working conditions at the various supermarkets operated by the Employer. As earlier noted, the signature page of the collective bargaining agreement contains the names and addresses of five supermarkets, and the name and address of a sixth supermarket appears on the cover page. Four supermarkets are located in Queens and two, including the Ridgewood Place facility, are located in Brooklyn, New York. The parties stipulated that they are located 4 to 5 miles apart from each other. The parties further stipulated that that the Employer's centralized distribution facility is located in Brooklyn and also serves as its corporate headquarters. Paychecks for all of the Employer's bargaining unit employees are generated at its corporate headquarters.

Each store has a manager. The managers report to the Employer's Director of Operations, and this individual, in turn, reports to the Employer's officers and owners.

Managers are responsible for hiring and firing employees at their stores. The parties stipulated that the job classifications at the different stores are "similar" and require similar skills.

There is little evidence of employee interchange. Solis testified that she knew of two employees who had transferred, at their own request, from the Ridgewood Place supermarket to other stores. As earlier noted, the Intervenor's list of members that it believed were employed at the petitioned-for facility showed twelve names, but only two of these names appear on the Employer's

current payroll. Morrissey speculated that the others may have transferred to other locations. However, there was no definitive evidence that this had occurred.

The Board has long held that to be certifiable under Section 9 of the Act, a unit need not be the most appropriate unit. Rather, it need only be an appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950). When making unit determinations in representation cases, the Board first examines the appropriateness of the unit sought by the petitioner and then considers alternate units if it finds the petitioned-for unit inappropriate. P.J. Dick Contracting, 290 NLRB 150 (1988).

With regard to single location units, such as that sought by the Petitioner, the Board has long held that single location units are presumptively appropriate unless those facilities have been merged, through bargaining history or operational integration, into more comprehensive units. Ohio Valley Supermarkets, Inc., d/b/a Foodland of Ravenswood, 323 NLRB 665 (1997); Haag Drug Company, Incorporated, 169 NLRB 877 (1968). When a single facility unit is contested, the burden of rebutting the single location presumption falls upon the party opposing such a unit. In determining whether this presumption has been overcome, the Board examines such factors as local autonomy, employee interchange, the distance between facilities and the integration of operations.

In the instant case, neither the Employer nor the Intervenor oppose the single store unit sought by the Petitioner. Although the Ridgewood Place

supermarket is part of a contractual multistore unit, there is little if any evidence that the contract has been applied to the store and apart from the above described record, virtually no information concerning the bargaining history related to the store. The store manager has the automony to hire and fire. What little interchange there is appears to be voluntary in nature, a factor to which the Board accords relatively little weight. First Security Services Corp., 329 NLRB No. 25, fn. 5 (1999); AVI Food Systems, 328 NLRB No. 59 (1999). In light thereof, to accord any weight to prior bargaining history in the multi-store unit is unwarranted.

Accordingly, inasmuch as the record appears to support the Board's single facility presumption in this case, and none of the parties contest the appropriateness of the petitioned for unit, I find the following unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time employees employed by the Employer at its supermarket located on 1759 Ridgewood Place (454 Wyckoff Avenue), Brooklyn, New York, excluding store managers, butchers, meat wrappers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill,

on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 890, League of International Federated Employees, by Retail, Wholesale and Chain Store Food Employees Union, affiliated with Retail, Wholesale and Department Store Union, AFL-CIO, or by neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the issuance of this Decision, four (4) copies of an election eligibility list, containing the full names

and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before March 29, 2000. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the

Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by April 5, 2000.

Dated at Brooklyn, New York, this 22nd day of March, 2000.

/S/ ALVIN BLYER

_____

Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

347 4040 5001 5000
347 4040 3367 3300